10

SUPREME COURT OF THE UNITED STATES.

No. 374.

FRANCIS A. GIBBONS, SENIOR, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

Petition.

FRANCIS A. GIBBONS, sen.,
against
THE UNITED STATES OF AMERICA.

To the honorable judges of the Court of Claims of the United States of America:

The petition of Francis A. Gibbons, sen., of Baltimore, Maryland, respectfully shows that heretofore, to wit, on the 16th day of November, 1863, at Baltimore, aforesaid, he entered into a written contract with Capt. Charles W. Thomas, Assistant Quartermaster of the United States Army, at Baltimore, acting for and on behalf of the United States of America, whereby it was agreed by and between the said Capt. Charles W. Thomas, for and on behalf of the United States of America, of the one part, and your petitioner, of the other part, as follows, to wit:

That the said Francis A. Gibbons, sen., shall deliver, in the city of Baltimore, to Capt. Reese M. Newport, A. Q. M., or his successor, forage of the following kinds and descriptions, namely:

One hundred thousand (100,000) bushels of oats, at ninety-eight (98) cents per bushel, of thirty-two pounds per bushel, and shall deliver at Fort Monroe, to the United States Quartermaster at that post, his successor or their assigns, one hundred thousand (100,000) bushels of oats, at one dollar one three-quarter cents per bushel, of thirty-two pounds per bushel, said oats to be delivered in sacks of two bushels each, or thereabouts, and to be dry, and of the best merchantable quality.

That for each and every bushel of oats delivered and accepted under this contract, the said Francis A. Gibbons, sen., shall
2 receive ninety-eight cents for one hundred thousand bushels, and one dollar one and three-quarter cents for one hundred thousand bushels, as above written.

That all the forage offered under this contract shall be inspected by inspectors appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be rejected.

That the said Francis A. Gibbons, sen., shall deliver all the said forage within thirty days from the date of this contract.

That payment shall be made upon the completion of this contract, or as soon thereafter as the Depot Quartermaster shall be in funds for the purpose, and that no member of Congress shall be admitted to any share herein, or any benefit to arise therefrom.

Which said contract, so made as aforesaid, was, on the said 16th day of November, 1863, signed, sealed, and delivered in duplicate by the said Capt. Charles W. Thomas, Assistant Quartermaster as aforesaid, and by your petitioner.

Your petitioner further states, that he is a citizen of the United

States, and that he has, at all times, borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

He further shows, that in accordance with his said contract, he proceeded at once to ship a portion of said oats to Fortress Monroe; that on the arrival of said oats at the place of delivery, the government was unable to receive the same, and to unload the vessels in which they were transported. The consequence was, that the said vessels were detained at the said fortress for several days, subjecting your petitioner to the payment of demurrage, amounting to $332 35.

Your petitioner further shows, that in still further fulfillment of his contract, he caused to be hauled, for delivery, to the
3 Camden Station of the Baltimore and Ohio railroad a large quantity of oats, but the government, through the said Thomas and his agents, were unable to receive the same, for want of storage and transportation, and, therefore, your petitioner was compelled to have the said oats rehauled to the warehouse, and restored; that this occurred on several occasions, just preceding the time for the final completion of the contract, and subjected your petitioner to very large expenses for hauling, clerk's hire, and warehousing, amounting to the sum of $400.

Your petitioner further shows, that the time for the completion of the contract aforesaid, on his part, expired on the 16th day of December, 1863; that previous to said time he offered to deliver, and was ready to deliver, to the government of the United States the whole quantity, viz: 200,000 bushels of oats of the quality named in the contract; but the said government refused to receive over 59,258 bushels, because of the want of transportation and warehouse room; that your petitioner, at the expiration of the period aforesaid, notified the said quartermaster that his obligations under said contract were at an end. Notwithstanding this, the said Thomas required your said petitioner to furnish other oats to the extent of 140,742 bushels, some long time after the expiration of said period. In the meanwhile the price of oats had advanced in the market, and in consequence of such advance it cost your petitioner largely more to procure and deliver the said 140,742 bushels of oats, which he was required to and did deliver after the expiration of the time limited by said contract for said delivery, than it would have cost him had he been permitted to deliver said oats at the time stipulated in said contract for the delivery thereof; and the government was actually paying to other contractors for oats at the time of said delivery, the sum of $1 10 and $1 12 per bushel, instead of the price agreed on in and by said contract.

4 Your petitioner, therefore, claims that he is entitled to the sum of 12 cents per bushel on that part of the said 140,742 bushels delivered in Baltimore, and 8¾ cents per bushel on the part delivered at Fortress Monroe, making in all $14,047 26.

He further shows, that after having been ordered and required to

deliver the said last named oats, the government, upon the said oats being hauled to the place of delivery, were unable to receive the same for want of transportation and storage, and your petitioner was again subjected to heavy expenses and charges, amounting to the sum of $804.

He further shows, that by the terms of his contract, he was entitled to receive the amount of said contract in cash, instead of which the said Thomas compelled your petitioner to accept certificates of indebtedness and other depreciated paper in settlement of his claim, which he was obliged to sell in the market at a loss of $1,646 88.

Your petitioner further shows, that he bought 5,000 second-hand bags of the government at market rates; that in the settlement with said Thomas, he deducted, on account of said bags, 2 cents per bushel more than the contract price, making the sum of $330; and in addition, deducted from the price of the contract for the oats the sum of $1,446 52, on the pretence that he did not receive the oats in time, and was compelled to buy other oats.

Your petitioner shows, that in order to obtain payment of the large sum of money in the hands of said Thomas, quartermaster as aforesaid, he was compelled to submit to said deductions, and to comply with his inequitable demands; but he did so, protesting that he was entitled to the sum of money above named.

He therefore claims as due him from the government of the United States the sum of $19,006 71, as per the account herewith filed, and prayed to be taken as part of this petition. He prays that his said claim may be investigated, and that he may have relief according to law and equity; and as in duty bound will ever pray, &c.

EWING, HILL & BROWNING,
Washington, D. C., Counsel for Claimant.

Post-office address of claimant, Baltimore, Md.; of claimant's counsel, No. 12 North A street, Capitol Hill, Washington, D. C.

Francis A. Gibbons, sen., being first duly sworn, deposeth and saith, that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that said claimant is justly entitled to the amount in this petition claimed from the United States of America, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

FRANCIS A. GIBBONS.

WASHINGTON, *May* 18, 1864, *ss:*

Subscribed and sworn to before me.

SAM'L H. HUNTINGTON,
Ch. Cl'k Ct. of Claims.

6 BALTIMORE, *April 9th*, 1864.

United States to Francis A. Gibbons, Dr.

To damages sustained by failure of government to receive oats, under contract, at time of delivery	$400 00
To damages sustained in hauling oats to Camden Station, &c., after the expiration of contract, by order of Capt. Thomas	804 00
To demurrage	332 35
To discount on certificates of indebtedness	1,646 88
To overcharges on bags	330 90
To money improperly retained by Capt. Thomas	1,446 42
Difference in price of oats delivered after the expiration of contract:	
75,786 bushels of oats at Fortress Monroe, at 8¼	6,252 34
64,956 " " at Baltimore, at 12	7,794 72
	$19,006 71

7 In the Court of Claims.—October term, 1864.

FRANCIS A. GIBBONS
vs.
THE UNITED STATES } No. 2,091.

And now come the United States, by Charles Gibson, their solicitor, and say that they are not indebted unto the said claimant in the said sum of $19,006 71, nor any part thereof.

And as to so much of said petition as avers that the claimant has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants say that they are not advised of the truth of said allegations, and therefore deny the same.

CHARLES GIBSON,
Solicitor for United States.

July 6, 1864.

8 In the Court of Claims.

FRANCIS A. GIBBONS, senior,
vs.
THE UNITED STATES. } No. 2,091.

And now, to wit, 25th March, 1867:

The court, upon due consideration of the premises, do find in favor of the claimant, and do order, adjudge and decree, that the said Francis A. Gibbons, senior, have and recover of and from the United States the sum of one thousand seven hundred and twenty-six dollars and fifty-two cents $1,726 52.)

BY THE COURT.

9 In the Court of Claims.—December term, 1866.

FRANCIS A. GIBBONS
vs.
THE UNITED STATES. } No. 2,091.

The said claimant hereby makes his application for, and prays the said court to allow an appeal from the judgment rendered by said court, in said cause at this term, to the Supreme Court of the United States.

A. L. MERRIMAN,
Attorney for Claimant.

10 At a Court of Claims held at the Capitol in the city of Washington on the 20th day of May, A. D. 1867.

FRANCIS A. GIBBONS, senior,
vs.
THE UNITED STATES. } No. 2,091.

Mr. A. L. Merriman, counsel for the claimant, filed in this case a petition for an appeal to the Supreme Court of the United States from the judgment entered thereon on the 25th of March, 1867, whereupon it was ordered that the petition be allowed.

11 Finding of facts by the court, and the conclusion of law on which the court founds its judgment.

In the Court of Claims.

FRANCIS A. GIBBONS
vs.
THE UNITED STATES.

Statement of facts.

On the 16th day of November, 1863, claimant entered into a contract with defendant for the delivery of one hundred thousand bushels of oats at Baltimore, and one hundred thousand bushels of oats at Fortress Monroe, to be of good quality, within thirty days from the date of the contract.

Claimant delivered a portion of the oats, and was ready and offered to complete the contract within the period of its limitation, but was prevented by the officers of defendant from so doing, and they would not receive them for the reason that they had not convenient storehouses therefor.

Subsequently the quartermaster having charge of the contract on the part of defendant, sent an "orderly" to claimant, requesting his immediate presence with the messenger or orderly at the office of that official, which was understood by the claimant to be an
12 arrest. About the same time the claimant was notified that he must deliver the balance of the oats specified in

the contract under penalty of a purchase in open market; the difference of cost to be charged to him; the said quartermaster at the same time held a large sum of money in his hands, the price of grain before that time delivered by claimant. The claimant remonstrated and contended that the contract was at an end, but influenced by the above assumption of power and the threats used, or for some other reason, did deliver the quantity of oats sufficient to make in all the amount specified in the contract.

By this time oats had advanced in price, and the market price which claimant was compelled to pay, exceeded the amount paid him.

Claimant was compelled to pay as demurrage on certain vessels the sum of $333 35, which were laden with a portion of said
13 oats, and which detained by the government officers in receiving the cargoes.

Claimant was charged, in the final settlement with the quartermaster, $1,063 77, for 8,000 bushels of oats purchased by the quartermaster in open market, at an advanced cost of twelve cents per bushel, after the expiration of the contract, which money was detained from him. There was also charged to and detained from claimant in said settlement the sum of $330, overcharged upon the purchase of a number of grain sacks.

14 *Conclusions of law.*

The obligation on the part of the government under this contract to receive the oats when they were offered, was as strong as the obligation to deliver. Claimant was not bound under a continuing obligation, and as he had made a reasonable offer, which was improperly refused, that put an end to the contract, and he was released from his obligation by the conduct of the government. The officers who threatened him had no authority to compel him to deliver the oats, and the threats used were super-serviceable and improper. If he was so unwise as to submit to the unauthorized mences of the quartermaster, he must take the consequences. Hence, he cannot recover the difference in price between that named in the contract and that ruling in market after its expiration.

Nor can the government withhold from the sum justly due to the claimant any difference which was paid for oats purchased
15 after the expiration of the contract exceeding the price fixed by it.

Therefore, the claimant should recover the sum of $1,063 17, which was so withheld at the time of settlement; also, the overcharge on the sacks purchased by claimant, $330; also, the said demurrage, $334 35, amounting in all, to $1,726 52.

16 In the Court of Claims.

FRANCIS GIBBONS, sen.
vs.
THE UNITED STATES.

I, Samuel H. Huntington, Chief Clerk of the Court of Claims, do hereby certify, that the foregoing are true transcripts of the pleadings in the above-entitled cause, and of the final judgment of the court thereon; of the petition of claimant's counsel for the allowance of an appeal, and of the order of the court allowing the appeal, and of the finding of the facts and the conclusions of law on which the court founds its judgment.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at Washington, this 12th day of December, A. D. 1867.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Supreme Court of the United States.

DECEMBER TERM, 1867.

FRANCIS A. GIBBONS
vs.
THE UNITED STATES.

This is an appeal from the Court of Claims.

The statement of facts as made by the court below, shows that the plaintiff in error entered into a contract with the defendant in error, for the delivery of 200,000 bushels of oats, one-half at Baltimore, and one-half at Fortress Monroe, within thirty days from the date of the contract, bearing date November 16, 1863; that the plaintiff was ready and willing, and offered to deliver the same within the time specified, but that a large portion of the same were refused by the defendant without sufficient cause, that sometime after the termination of the contract, the defendant withholding the pay for the oats already delivered, made a demand for the balance of the oats specified in the contract, which demand was accompanied by the assertion of military authority, in such a manner, as to cause the plaintiff to consider himself under arrest, and with the further threats of retaining the money in hand, and applying the same in paying the difference between the contract price, and the then market price of the article. That under these circumstances, the plaintiff in error proceeded to purchase and deliver such oats as were required, protesting, however, that the contract was at end, and against delivering such oats at the prices specified therein. That the price of oats had increased, so that the market price which he was compelled to pay, exceeded the prices to be paid to the plaintiff, being the contract price.

The Court of Claims correctly decide that the obligation on the part of the Government under the contract, was to receive the oats when they were offered, was as strong as the obligation to deliver. That claimant was not under a continuing obligation, and as he had made a reasonable offer, which was improperly refused, that put an end to the contract, and he was released from his obligatien by the conduct of the Government, Or, in other words, that after having offered to deliver the article specified, which was not accepted, he was not bound to furnish storeroom, and incur the expenses of keeping on hand for any period after the time specified in the contract had expired, subject to the demand of the other contracting party. It therefore seems to be a clear proposition, that in case of the delivery of the article subsequent to the termination of the original contract, such delivery is under a new contract that may be made between the parties to the contract, and in case no express contract is made as to the price of the articles so sold and delivered, there would be an implied one on the part of the purchaser, to pay for such articles so sold and delivered, the market value of the same, at the time and place of delivery, unless there was an agreement to sell at the prices specified in the agreement then at an end.

In this case, it is not pretended that any such agreement was made; on the contrary, the plaintiff insisted that the contract was at an end, and the fact that he made the delivery of oats required under a supposed personal arrest, and under the threat of withholding the money due to him upon oats previously delivered, is conclusive, on the proposition that there was an agreement, either express or circumstantial, to deliver the oats at the prices specified in the original contract, and rebuts any presumption of a voluntary delivery under the terms of the extinct contract. The error, therefore, that the court below has made, is its refusal to allow to the plaintiff in error the market value of the oats so delivered, and in treating the payment by the defendant of the amounts specified in the contract before then, terminated as a full payment. Notwithstanding the fact, that such pay-

ment was only a partial one, and the fact that, as the court say, the officers who threatened him, had no authority for so doing, and that such threats were improper, does not tend to establish the conclusion that the prices as established by the extinct contract, were to govern the prices of the oats thereafter delivered. The Government cannot take advantage of the many doings of its agents, in fixing the terms of contracts.

The Government by its action, admits the purchase of the grain, but attempts to settle the terms of such purchase by its own agents, and without reference to the ruling price of the article, or to the ordinary rights of the seller to dictate terms of sale.

The court should therefore have allowed him the value of the oats when sold and delivered, deducting therefrom, the amount paid by the Government.

REVERDY JOHNSON,
A. L. MERRIMAN,
for Plaintiff in Error.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

FRANCIS A. GIBBONS, SR., APPELLANT,
vs.
THE UNITED STATES.
} No. 219.

Brief for the United States.

This case comes here by appeal from the Court of Claims, where, upon a claim for nineteen thousand and six dollars and seventy-one cents, ($19,006 71;) judgment was rendered that the claimant recover the sum of one thousand seven hundred and twenty-six dollars and fifty-two cents, ($1,726 52.)

The claimant had, on November 16, 1863, made a contract to deliver to the United States, within thirty days from that date, two hundred thousand bushels of oats, and had been prevented from fulfilling it within that term by the refusal of the quartermaster having charge thereof to receive the oats offered by the claimant.

Subsequently, influenced by an assumption of power and threats used by the defendants' officer, he did deliver a quantity of oats sufficient to make, or nearly so, in all, the amount specified in the contract; and received in settlement therefor the contract price, which, with certain deductions on other items, was paid to him. Meanwhile, however, the market price of oats had advanced, and the difference between the contract price of oats and the market price at the time of their delivery was the principal sum claimed in the original petition.

In refusing to give judgment for this sum, or any part thereof, there was no error on the part of the Court of Claims, the conclusion of law stated in the following extract being entirely correct:

"The officers, who threatened him, had no authority to compel him to deliver the oats; and the threats used were superserviceable and improper. If he was so unwise as to submit to the unauthorized menaces of the quartermaster, he must take the consequences. Hence, he cannot recover the difference in price between that named in the contract and that ruling in market after its expiration."

Besides the reason here given for refusing this allowance, is the additional reason, that the facts found leave open to the appellate court, the inference, that the whole matter had been voluntarily settled by a payment in full. (Theo. Adams *vs.* United States, 7 Wallace, 463.)

Accordingly, the case should now be disposed of by a mandate to the Court of Claims to reverse the judgment in favor of the claimant and dismiss the petition. The appeal, being general, brings up for consideration the whole judgment.

E. R. HOAR,
Attorney General of the United States.

SUPREME COURT OF THE UNITED STATES.

No. 376.

HENRY PELHAM, PLAINTIFF,

vs.

DAVID G. ROSE, G. B. ROBERTS, SETH WAY, ISAAC B. COPLIN, SETH EASON, AND ABRAM HUPP.

ON CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE ~~SOUTHERN~~ DISTRICT OF ~~OHIO~~ Indiana

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a DISTRICT OF INDIANA, *ss:*

At a Circuit Court of the United States, begun and held at Indianapolis, for the district of Indiana, on the 7th day of May, A. D. 1867, and there continued from day to day till the 15th day of June of the same year, before the Hon. David Davis, Associate Justice of the Supreme Court of the United States, and the Hon. David McDonald, Judge of the District Court of the United States for the District of Indiana, the following proceedings were had:

Action of debt.

HENRY PELHAM
v.
DAVID G. ROSE, GEORGE B. ROBERTS, SETH GAY, ISAAC B. COPLIN, SETH EASON, and AARON HUPP.

1 *Abstract of pleadings.*

This is an action on an official bond made by the said David G. Rose, marshal of the district of Indiana, as principal, and by the other of said defendants, as his sureties.

In said actien the plaintiff filed his declaration on the 22d day of April, 1867.

And afterwards, to wit, on the 31st day of May, 1867, the defendant, David G. Rose, appeared to said action, and filed his demurrer to said declaration; and the plaintiff thereupon joined in demurrer.

And this cause coming on at this term of the court to be argued and heard by said judges on said demurrer and joinder, the following points occurred and became material to the proper decision of said demurrer, to wit:

Points of difference.

1. Whether upon the facts stated in the said declaration, it was material and necessary to the due and legal service and execution of the writ of monition therein set forth by the said David G.
2 Rose. marshal as aforesaid, that he should have actually seized and taken into his custody and under his control the promissory note mentioned in the declaration.

2. Whether the return to said writ of monition as set forth in said declaration, must be construed to mean that the said marshal had actually taken into his custody and under his exclusive control the said promissory note.

3. Whether on the hypothesis that all the matters set forth in said declaration are true, the judgment and proceedings in the District Court as therein stated would estop the said plaintiff to maintain an action on the said promissory note against the maker thereof.
3 On which questions, and on each of them, the opinions of the said judges were opposed.

Whereupon, on motion of the plaintiff by his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the said judges and certified under the seal of the court to the Supreme Court of the United States, to be finally decided.

Order certifying points.

It is therefore ordered that the points of disagreement aforesaid, together with a copy of said declaration, demurrer and joinder, be so certified accordingly to the said Supreme Court for final decision; all which is hereby done by the said judges.

And here follows the declaration above mentioned:

United States Circuit Court, District of Indiana, to wit:

HENRY PELHAM
vs.
DAVID G. ROSE, GEORGE B. ROBERTS, SETH Gay, Isaac B. Coplin, Seth Eason,
4 and Abram Hupp. } Of May term, 1867.

Declaration.

Henry Pelham, a citizen of the State of Kentucky, plaintiff in this suit, complains of David G. Rose, George B. Roberts, Seth Way, Isaac B. Coplin, Seth Eason and Abram Hupp, citizens of the State of Indiana, defendants in this suit, of a plea that they render to the plaintiff the sum of twenty thousand dollars, which they owe to and unjustly detain from him.

For that the defendant Rose, heretofore, to wit, on the 22d day of March, A. D. 1861, was, by the President of the United States, pursuant to law, appointed to be the marshal of the United States for the said State of Indiana, for four years from the first day of April, A. D. 1861, and received and accepted a proper commission to said office in due form, bearing date the 22d day of March, 1861.

And the plaintiff further says, that to entitle the said Rose to execute the functions of marshal under his said appointment and commission, the defendant afterwards, to wit, on the fifth day of April, 1861, executed in due form of law, (the said Rose by the name of "D. G. Rose," the said Roberts, by the name of Geo. B. Roberts, and the said Coplin, by the name of "I. B. Coplin,")
5 their certain bond or instrument in writing, under their hands and seals, before the judge of the District Court of the United States in and for the said district, whereby they acknowledged themselves to be held and firmly bound unto the United States of America, in the said sum of twenty thousand dollars, for which payment well and truly to be made they bound themselves, their heirs, executors and administrators, jointly, severally, and firmly, with a condition thereunder written that if the said Rose, by himself and by his deputies, should faithfully perform all the duties of the said

office of marshal, then the said obligation should be void, otherwise to [to] remain in full force and virtue.

Which said bond, approved by the said district judge, on the 22d day of April, 1861, was afterwards duly filed and recorded in the office of the said District Court, and the said Rose having taken before said judge, the oath of office required by law, he did thereupon, to wit, on &c., at &c., aforesaid, enter upon the discharge of the duties of said office of marshal of said district, and the plaintiff produces and shows to the court here a copy of said bond, with the condition thereunder written, certified by the clerk, under the seal of the court.

And the plaintiff further says, that afterwards, to
6 wit, on the 30th day of April, A. D. 1863, at &c., aforesaid, the said United States, by their counsel John Hanna, esquire, filed in the clerk's office of the said District Court a certain libel of information, alleging and informing the said court, amongst other things, in substance and to the effect following, that is to say:

That he, the said Hanna, attorney of the said United States, for the said district of Indiana, and who prosecuted for the said United States, exhibited that his libel of information against the following described credits and effects of one Henry Pelham (thereby referring to and meaning the plaintiff in this suit,) who, as was alleged in the information, was a person guilty of aiding and abetting an armed rebellion against the said United States, that is to say: one promisssory note for the sum of seven thousand dollars, dated March 1st, 1862, and due four years after date, executed by Lewis Pelham to the said Henry Pelham, and against all persons, lawfully intervening for their interests therein, and more especially against the said Henry Pelham.

And the said John Hanna did, in and by the said libel, further charge, that the said estate credits and effects of the said Henry Pelham, described as aforesaid, were forfeited to the United States, and liable to be condemned as enemies property for the causes within said libel set forth, to wit: First. For that whereas, theretofore, to wit, on the 17th day of July, 1862, the Congress of
7 the United States of America, by an act of that date approved entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, among other things, provided that if any person, within any State or Territory of the United States other than those named as aforesaid after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation, duly given and made by the President of the United States, cease to aid, countenance and abet such rebellion, and return to his allegiance to the United States, all the estate, property, money, stocks, and credits of such persons, shall be liable to be seized as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof, and further "to secure the condemnation and sale of any of such property, proceedings in rem, shall be instituted in the name of the United States,

in the District Court, and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be con-
8 demned, as enemies property.

And it was further alleged in the said libel, that the President of the United States, by proclamation, duly made on the 25th day of July, A. D. 1862, issued public warning to all persons contemplated by said provision, and the sixty days therein specified had expired on the 23d day of September, A. D. 1862; and that nevertheless, in defiance of said statute, and the warning so given as aforesaid, the said Henry Pelham, being the owner of said estate, credits and effects, so described as aforesaid, continued to aid and abet the armed rebellion as aforesaid, and refused to return to his allegiance to the United States; he, the said Henry Pelham, having, prior to the expiration of said sixty days, been engaged in armed rebellion against the government of the United States, and having been engaged in aiding and abetting such rebellion, and still continued so to do; and that thereby and by force of the said statute and the said public warning of the President of the United States, so made as aforesaid, said estate, credits and effects of him, the said Henry Pelham, so described as aforesaid, became and was forfeited to the United States and that the same was liable to be condemned as an enemies' property: Wherefore, the said attorney of the United States, in and by the said libel, prayed that process, in due form of law,
9 might be issued against the said estate, credits and effects, so described as aforesaid, to enfore the forfeiture and condemnation thereof, and requiring all parties in interest, and more especially the said Henry Pelham, to appear and show cause, on the return day of said process, why said forfeiture should not be decreed in manner and to the extent by law provided; and that process might also issue against the maker of said note, to wit, the said Lewis Pelham, and that due service and return thereof should be made.

And whereas, afterwards, to wit, on the 30th day of April, 1863, aforesaid, there was issued out of the clerk's office of the said District Court of the United States for the District of Indiana, a certain writ, called a writ of monition, in substance and to the effect following, that is say:

"THE UNITED STATES OF AMERICA,
District of Indiana, ss:

"The President of the United States of America, to the marshal of said district, greeting:

"Whereas, a libel has been filed in the District Court of the United States for the District of Indiana, on the 30th day of April, in the year of our Lord one thousand eight hundred and sixty-three, by John Hanna, esq., attorney of the United States for the District of
10 Indiana, against one promissory note, for the sum of seven thousand dollars; said note dated March 1st, 1862, and due four years after date, executed by Lewis Pelham to Henry Pelham, and

against all persons lawfully intervening for their interest therein, and more especially against the said Henry Pelham; for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said note may be cited, in general and special, to answer the premises; and due proceedings being had that the said note may, for the causes in the said libel mentioned, be condemned, and the proceeds thereof distributed according to law.

"You are hereby commanded to attach the note, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the District of Indiana, on the first Monday of June, 1863, at 10 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise, on the next day of jurisdiction thereafter, then and
11 there to interpose and claim for the same, and to make their allegations in that behalf; and what you shall have done in the premises, do you then and there make return thereof, together with this writ.

"Witness, Honorable Caleb B. Smith, judge of the said court, at the city of Indianapolis, the 30th day of April, in the year of our Lord one thousand eight hundred and sixty-three and of the independence of the United States of America the 87th.

[SEAL.]

Attest: "JOHN H. REA, *Clerk.*

"JOHN HANNA,

"*Proctor for Libelant.*"

And the plaintiff further says, that afterwards, to wit, on the day and year last aforesaid, the said writ of monition came to the hand of the said Rose, the marshal of said district, in due form of law to be executed; and the same was afterwards, to wit, on the 2d day of May, A. D. 1863, duly returned to the said clerk's office by the said Rose, he being then the marshal of the said district, in virtue of his said appointment and commission, with the following return indorsed thereon:

"*May 2d*, 1863.

"In obedience to the within warrant, I have arrested the property within mentioned, and have cited all persons having or pre-
12 tending to have any right, title or interest therein, as by the said warrant I am commanded to do.

(Signed) "D. G. ROSE,

"*U. S. Marshal.*

"By I. S. BIGELOW, *Deputy.*"

And the plaintiff further says, that afterwards, to wit: on the May term of the said District Court, said court did proceed to and did

try and adjudicate the matters involved in the said libel information, whereupon the court amongst other things ordered, sentenced and decreed as follows:

1st. That, for failing to appear in said court, when proclamation was ordered for all persons interested in said note to interpose their claims, it was ordered by the court that the defaults of all persons should be entered, and

2d. That the libel of information, as to all the matters and things therein charged, should be taken as confessed;

3d. That the said promissory note, for seven thousand dollars, dated March the 1st, 1862, due four years after date, should be, and was by said decree, condemned as forfeited to the United States, for the reasons and causes in said libel of information stated;

And, that the clerk should issue a decree of venditioni exponas to the marshal of the district, by virtue of which, after giving
13 ten day's notice in the manner prescribed for the sale of personal property, the marshal should expose at public auction to the highest bidder, the said promissory note and all the right, title, interest and claim of him, the said Henry Pelham, and all the other persons, in and to the same, at the office of said marshal, in the city of Indianapolis, and that the said marshal should be authorized to execute and deliver to the purchaser of the note such a certificate of purchase, assignment or transfer as should fully, completely, and absolutely transfer to, and vest in the purchaser, all right, title, interest and claim of him, the said Henry Pelham, and all other persons in and to said promissory note; and as should absolutely and forever debar him, the said Henry Pelham, and all other persons, from setting up, or in any wise maintaining any right, title or claim thereto, and as should fully and completely authorize and entitle the said purchaser to succeed to all the rights, title, claim and interest in the said note which the said Henry Pelham, or his assigns, would have had had he not been guilty of the offence charged in said libel; and that the said venditioni exponas should be returnable upon the first day of the then next term of said court, at which time he,
14 the said marshal, should pay into court, all moneys made, to be paid out on the order of the court.

And the plaintiff further says, that afterwards, to wit: on the 6th day of June, 1863, a writ of venditioni exponas, in the said cause, was issued out of the office of the clerk of the said court, commanding the said marshal to proceed to execute the said decree in all things, according to the tenor and effect thereof, which said writ was then and there delivered to the marshal to be executed, and afterwards, to wit, on the 28th day of September, 1863, the said writ was, by the said marshal, returned into the said clerk's office, with the following return indorsed therein, viz:

"After having given due notice of the time and place, according to the order of this decree, I did, on Saturday, the fifth day of September, A. D. 1863, at the office of the United States Marshal, in the city of Indianapolis, in the State of Indiana, offer for sale at public auction, one promissory note for seven thousand dollars,

executed by Lewis Pelham, on the first day of March, A. D. 1862, to Henry Pelham, due four years after date, and Lewis Pelham, bid therefor the sum of three thousand dollars, and he being the highest bidder therefor, I did then and there sell the same to him; and
15 which sum he has paid, and I have paid to Watt I. Smith, esq., the amount, three thousand dollars, as per his receipt hereon."

(Signed) "D. G. ROSE, *C. S. Marshal.*
"By I. S. BIGELOW, *Deputy.*"

And the plaintiff further says, that afterwards, to wit, at the special term of said District Court, on the 28th day of September, A. D. 1863, further proceedings were had in said cause, amongst which proceedings was the appearance in the cause of the said Rose, who continued to be the marshal under and in virtue of his said appointment, and who submitted to the court a report showing, amongst other things, that he had, in pursuance of the said order and decree of the said court, made sale of the property mentioned in the libel, the proceeds of which amounted to the sum of three thousand dollars, all of which he then paid into the said court. All which will now fully and at large appear by the said decree, judgment, and orders of said court remaining of record therein.

And the plaintiff avers that the defendant, Rose, did not by himself and by his deputies, faithfully perform all the duties of the said
16 office of marshal, according to the condition of the said bond, but violated and broke the same in this, to wit, he did not, in obedience to the mandate of the said writ of monition, "attach the property therein described," nor did he attach the said promissory note of the said Lewis Pelham, as thereby commanded; nor did he seize the same, neither by himself nor any deputy, nor was the said promissory note even in the custody, possession, or sight of the said marshal, or of any deputy of his for a single instant of time, between the date of the delivery to him of the said writ for execution thereof, and the return thereof by him to the clerk's office as hereinbefore stated; but that even after the execution of the said note to the plaintiff, and during the commencement and pendency of the said suit, and until long after the said decree and order of confiscation was entered as hereinbefore stated, the said promissory note was in the custody and possession of the plaintiff, in Mason County, in the State of Kentucky; and during all the time aforesaid, the said promissory note was never within the territorial limits of the said State of Indiana.

Wherefore, the plaintiff says that the return indorsed upon the said writ by the said marshal, that he had, in obedience to the said
17 warrant arrested the property therein mentioned, was and is wholly false.

And the plaintiff further says, that the said judgment of condemnation of the said promissory note was formed upon and indorsed alone by the said false return of the marshal to the said writ.

By reason of which said breach the said bond or writing obligatory became forfeited, and thereby an action hath accrued to the said

plaintiff, to demand, and have of and from the said defendants, the sum of twenty thousand dollars above demanded.

Yet the defendants, although often requested, have not paid the same, but have hitherto wholly neglected and refused, and still neglect and refuse to the damage of the plaintiff, ten thousand dollars, and therefore he brings suit.

JAMES MORRISON, DYE & HARRIS
Attorneys for Pl'ff.

And here follows the demurrer above mentioned:

Cir. Ct. U. S., May term, 1867.

HENRY PELHAM
vs.
DAVID G. ROSE *et al.* } No. 1,072.

18 Comes the defendant, David G. Rose, and says that the plaintiff's declaration is not sufficient in law to constitute a cause of action against the defendants, and that they are not bound in law to answer the same, and he prays judgment for his costs in this behalf.

ALFRED KILGORE,
Att'y for said Def't.

And on the 31st day of May, 1867, in said court, the plaintiff joined in the demurrer, in record entry:

In the United States Circuit Court, district of Indiana.

I, John D. Howland, clerk of said court, do hereby certify that the above and foregoing is a full and complete transcript of the record and proceedings in said cause, above entitled, upon an opposition of opinion between the judges of said court, as fully as the same appears of record.

In testimony whereof, I do hereto set my hand and affix the seal of said court, at Indianapolis, this 31st day of August, A. D. 1867.

[SEAL.] J. D. HOWLAND, *Cl'k.*

SUPREME COURT

OF THE UNITED STATES.

HENRY PELHAM,

vs.

DAVID G. ROSE,
GEORGE B. ROBERTS,
SETH WAY,
ISAAC B. COPLIN,
SETH EASON, AND
ABRAM HUPP.

CERTIFIED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

PLAINTIFF'S BRIEF.

JAMES MORRISON,
DYE & HARRIS,
COUNSEL FOR PLAINTIFF.

DOWNEY & BROUSE, PRINTERS.

SUPREME COURT

OF THE UNITED STATES.

HENRY PELHAM,

v.

DAVID G. ROSE, GEORGE B. ROBERTS, SETH WAY, ISAAC B. COPLIN, SETH EASON AND ABRAM HUPP.

ABSTRACT AND STATEMENT OF THE CASE.

This is a case certified to the Supreme Court, by the Judges of the Circuit Court of the United States, for the District of Indiana, at its late May term, 1867, because of the occurrence of questions in the decision of a demurrer to the declaration, upon which the opinions of the Judges were opposed.

The questions were these:

"1. Whether, upon the facts stated in the declaration, it was material and necessary to the due and legal service of *the writ of monition*, therein set forth, by the said David G. Rose, Marshal as aforesaid, that he should have seized and taken into his custody and under his control, the promissory note mentioned in the declaration.

2. Whether the return to said writ of monition, as set forth in said declaration, must be construed to mean that the said marshal had actually taken into his custody and under his exclusive control, the said promissory note.

3. Whether, on the hypothesis that all the matters as set forth in said declaration are true, the judgment and

proceedings in the District Court, as therein stated, would estop the said plaintiff to maintain an action on the said promissory note, against the maker." *Record*, pages 1, 2.

The suit in which the questions arose, was an action of debt upon the official bond of the defendant Rose, for a false return made by that officer, as marshal, to a writ of monition issued to him by the District Court, on the 30th day of April 1863, in a proceeding by libel of information, instituted on behalf of the United States by the District Attorney, "against the following described credits, and effects of one Henry Pelham, (the plaintiff in this suit,) who, as was alleged in the information, was a person guilty of aiding and abetting an armed rebellion against the United States—that is to say, one promissory note for the sum of seven thousand dollars, dated March 1st, 1862, and due four years after date, executed by Lewis Pelham to the said Henry Pelham." *Record*, page 6, lines 7 to 20.

The *monition*, after reciting the filing of the libel "against the promissory note," described as above, commanded the Marshal "*to attach the note*, and to detain the same in his custody until the further order of the Court respecting the same, and to give notice to all persons," &c. *Record*, page 9, line 19, and page 10—1 to 4, and 17 to 20.

The following is the Marshal's return to the writ:

"May 2d, 1863. In obedience to the within warrant, *I have arrested the property within mentioned*, and have cited all persons having or pretending to have any right, title, or interest therein, as by the said warrant I am commanded."

[SIGNED,] "D. G. ROSE, *U. S. Marshal.*
"By J. S. BIGELOW, *Deputy.*"

The declaration avers that the Court thereupon adjudicated the matters involved in the libel, sentencing and decreeing as follows:

1st. That for failing to appear when proclamation was ordered for all persons interested in the note to interpose their claims, it was ordered that the defaults of all persons should be entered.

2d. That the libel, as to all the matters and things therein charged, should be taken as confessed.

3d. That *the said promissory note* for seven thousand dollars, should be and was condemned as forfeited to the United States, for the reasons stated in the libel, and that the Clerk should issue a decree of *venditioni exponas* to the Marshal of the District, by virtue of which, after ten days' notice, he should sell the said note at public auction, and all the right, title, interest and claim of the said Henry Pelham, and all other persons in and to the same, &c. *Record*, p. 12, 13.

It is further averred, that a writ was issued on the 6th day of June, 1863, in pursuance of the sentence, commanding the Marshal to execute the same; that the Marshal received the writ, and that he afterwards, on the 28th day of September, 1863, returned the same to the Clerk's office, certifying that he did, on the 5th day of September, 1863, offer at public sale, and did sell the said promissory note to Lewis Pelham, for the sum of three thousand dollars, which was paid by the purchaser. *Record*, p. 14.

The falsity of the return of the Marshal to the writ of monition, as shown by the declaration, is thus averred:

"That he did not, in obedience to the mandate of the said writ of monition, '*attach* the property therein described;' nor did he *attach the said promissory note* of the said Lewis Pelham, as thereby commanded; nor did he *seize* the same, neither by himself nor any deputy; nor was the said promissory note ever in the sight of the said Marshal, or of any deputy of his, for a single instant of time, between the date of the delivery to him of the said writ, for execution thereof, and the return thereof by him to the Clerk's office, as therein before stated; but that ever after the execution of the said note to the plaintiff, and during the commencement and pendency

of the said suit, and until long after the said decree and order of confiscation was entered, as herein before stated, the said promissory note was in the custody and possession of the plaintiff, in Mason county, in the State of Kentucky; and during all the time aforesaid, the said promissory note was never within the territorial limits of the said State of Indiana.

Wherefore, the plaintiff says that the return endorsed upon the said writ, by the said Marshal, that he had, in obedience to the said warrant, *arrested the property therein mentioned*, was and is wholly false." *Record*, p. 16.

BRIEF AND ARGUMENT.

I. The counsel for the plaintiff respectfully submit, that, "it was material and necessary to the due, and legal service of the writ of monition, that the Marshal should have seized and taken into his custody the promissory note mentioned in the declaration."

The note was the *res* involved in the proceeding instituted by the Government. It was the sole subject matter of that proceeding—its sole scope and object, as described in the libel, being the *seizure of the note* and its confiscation and sale as enemy's property, under the act of Congress of July 17, 1862.

In the assumption of this position, counsel do not overlook the provisions of the act under which the libel was exhibited, whereby it is declared that "all the estate, property, money, stocks and credits of such person shall be liable to seizure." Act of July 17, 1862, sec. 6, p. 591.

Nor do they mean to controvert the principle, in the law, which was so earnestly, and it is thought unnecessarily, pressed by the counsel on the other side, that a promissory note is a "credit," and that it is also "property," within the meaning of the act of Congress subjecting "all the estate and property" of the rebel to seizure.

What is claimed for the plaintiff, is simply, that in the proceeding which the Government elected to pursue

in the present case, it was essential to a legal service of the monition that the Marshal should have actually seized and taken into his custody, the very thing described in the writ.

The whole proceeding being against the note, and nothing else, and the writ having commanded the Marshal "to attach the note," and nothing else, he could obey the mandate only by seizing the note.

1. The act of Congress, approved July 17, 1862, entitled "An Act * * * to *seize* and confiscate the property of rebels, and for other purposes," prescribes:—

"Sec. 6. * * All the estate and property, moneys, stocks and credits, of such person, shall be liable to seizure as aforesaid; and it shall be the duty of the President to *seize* and use them as aforesaid, or the proceeds thereof.

"Sec. 7. That to secure the condemnation and sale of any such property, *after the same shall have been seized*, so that it may be made more available for the purposes aforesaid, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in any territorial Court, or in the United States District Court for the District of Columbia, *within which the property above described, or any part thereof, may be found, or into which the same may be brought*, * * which proceedings shall conform, as nearly as may be, to proceedings in 'admiralty and revenue cases;' and if said property shall be found to have belonged to a person in rebellion, the same shall be condemned as enemies' property."

That it was in the power of Congress to confiscate all enemies' property within its jurisdiction, and divest the title thereof, *eo instanti*, by mere legislative enactment, a question which we think it unnecessary to argue. If Congress possessed such power, it certainly did not attempt its exercise. All that was attempted by the act of July 17, 1862, was to confer the authority, and prescribe the manner by which enemies' property should be *seized*

and confiscated by the executive and judicial departments of the Government.

That act prescribes, that the property of persons aiding the rebellion "*shall be liable to seizure;*" that it shall be the duty of the President of the United States to *seize* said property; and that *after the seizure* proceedings *in rem* shall be instituted for its condemnation.

By the very terms of the act seizure is expressly made the foundation of the whole proceeding.

2. Sec. 7 prescribes that after seizure proceedings *in rem* shall be instituted for its condemnation.

"Judicial proceedings *in rem* for the purpose of enforcing a forfeiture, can be instituted only in pursuance of a previous seizure of the thing to be proceeded against. It is by virtue of the seizure that the thing is brought within the reach of the process of the Court, and consequently into its possession; when, and not before, judicial cognizance attaches." Conkling's Treatise, 4 ed., p. 457, referring to the case of *The Ann*, 9 Cranch 289.

The same author says further:

"To constitute a valid seizure there must be an open, visible possession claimed, and authority exercised under the seizure." *Ib.*

"In a proceeding *in rem* the possession of the *res* is indispensable to the effectual exercise of jurisdiction." *Id.*, p. 499.

In delivering the opinion of the Court in the case of *The Brig Ann*, 9 Cranch, 289, Justice Story says: "In order to institute and perfect proceedings *in rem* it is necessary that the thing should be actually or constructively within the reach of of the Court. * * * Before judicial cognizance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure."

In the case of the *Schooner Silver Spring*, reported in Sprague's Decisions, p. 552, referring to the case of *The Ann*, *supra*, Sprague, J., delivering the opinion of the Court, says:

"The decision in that case, did not depend upon the construction of the particular statute under which the property there became forfeited, but upon the construction of the act of 24th September, 1789—the judiciary act, which is equally applicable to the present proceeding. And therefore the rule laid down by the Supreme Court in that case, 'that before judicial cognizance can attach upon a forfeiture *in rem* there must be a seizure,' must govern the present case. * * The Supreme Court of the United States say, 'that it is a wise provision of the law, that requires the vessel to be seized;' that 'seizure gives jurisdiction to the Court.' * * * Some actual taking is necessary to give the Court jurisdiction."

In the case of *The Hibernia*, Sprague's Decisions, p. 81, decided in April, 1844, it was held: "In the execution of admiralty process, *in rem*, the officer should take actual and manifest possession, and hold it in such manner that inquirers and observers may learn or see that he had such possession."

In the case of *The Gazelle*, Sprague's Decisions, p. 379, February 1858, the Court said: "This libel was filed on the 23d of December, 1857, and on the same day a warrant was issued for the arrest of the vessel. The Marshal attempted to execute the process, but found the Sheriff in possession, claiming to hold her under a writ of attachment from the State Court; and as he refused to permit the Marshal to enter upon the vessel, or to take her into his custody, the latter desisted from the attempt. In that state of the case I refused to exercise jurisdiction over her. Whether the Sheriff could rightfully refuse to permit the Marshal to take possession in order to enforce a paramount lien, and whether the Marshal could properly have proceeded to execute his precept by force, in the same manner as against unlawful resistance by a private individual, are grave questions, which I do not now decide. Whatever may have been the respective rights and duties of the two executive officers, *the fact was that the Marshal had never had possession, and returned the precept unexecuted, and this debarred the Court from pro-*

ceeding further. I could not exercise jurisdiction over a thing which was not, and never had been, in custody of any officer of the Court."

See also, *The Julia Ann*, to the same effect, *Id.* p. 382.

In the case of *The Joseph H. Toone*, before Betts, J., in October, 1862, reported in Blatchford's Prize Cases, page 223: "The vessel and cargo were seized as prize October 1861. * * * The vessel was, it seems, on capture, detained for the use and service of the Government, but she not being included in the process or its return, no decree can be rendered against her in this action."

See also, *The Sarah and Caroline*, *Id.* p. 123.

Further citations are certainly unnecessary to show that, "In a proceeding *in rem*, the possession of the *res*, is indispensable to the effectual exercise of jurisdiction." Conkling's Treatise, 4 Ed. 499.

3. It is further provided by the act of July 17, 1862, that "the proceedings shall be instituted in the district where the property may be found or may be brought."

It is certain that under this act, no Court had jurisdiction in proceedings *in rem* to condemn rebel property, except the Court of the district "where the property was found or might be brought."

If the Marshal for the State of Indiana, could under the monition in this case, arrest a promissory note in Kentucky, which was not within the territorial limits of Indiana, he could have arrested a promissory note in England as well.

Indeed, under the latitudinarian construction claimed for this law, it is difficult to perceive why marshal Rose might not have "attached" or "arrested" the bills and notes of rebels in the bank of Trenholm & Co., in Liverpool. According to the construction claimed by the counsel for defendants, seizure is purely an imaginary thing; and if marshal Rose, while sitting in his office in Indianapolis, could, in the eloquent language of his counsel, "stretch the invisible fingers of the law to Kentucky," why not to Liverpool as well?

Besides, if the Marshal could make due and legal service of a monition commanding him to attach and detain in his custody, a promissory note, when the note was beyond the jurisdiction, then proceedings *in rem* to condemn such note might be instituted in any district in the United States, without any regard to the provisions of the act, requiring the proceedings to be instituted in the district where the property may be found or may be brought.

4. The act of Congress also prescribes, that the proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases.

The case in hand, was confessedly a libel of information, *in rem*, on the admiralty side of the Court; and the 22d Rule of Court declares that "all informations and libels of information, for any breach of the revenue or navigation, or *other laws of the United States*, shall state the place of *seizure*, whether it be on land or on the high seas, &c.; and the district within which the property is brought."

"In suits, *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects, to the amount sued for, in the hands of the garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall in his libel of information pray for or elect." *Rule*, 2d.

The libel of information contained the following prayer for process, and no other, to-wit: "That process in form of law may be issued against the said estate, credits, and effects, *so described as aforesaid*, to enforce the forfeiture and condemnation thereof, and requiring all parties in interest, and more especially the said Henry Pelham to appear," &c. *Record*, page 8, lines 1 to 4 from bottom, and page 9, lines 1 to 4.

The mandate, as has been shown, was *to attach the note*, and detain the same in custody till the further order of the Court, and to give notice to all parties claiming the same. *Record*, p. 10.

And the Marshal's return was that he had *arrested the property*, and had cited all persons.

Of this mandate, Conkling in his Treatise, 4th edition, page 325, says: "Upon the filing of the libel or information, the Clerk issues a writ to the Marshal commanding him to attach the property seized,"

"It is usually, and most properly, denominated a warrant of arrest—but is also sometimes called a monition. * * * On receiving it, it is the duty of the Marshal to arrest the property seized, by taking it into his custody."

The term arrested, employed by the Marshal, is the word to signify a seizure of the thing proceeded against.

That the warrant *of arrest*, was the appropriate process, will plainly appear by the ninth rule, which declares, that "In all cases of seizure, and all other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by *a warrant of arrest*, of the ship, goods, or other things to be arrested—and the Marshal shall thereupon *arrest and take the ship, goods, or other thing into his possession*, for safe custody, and shall cause public notice thereof," &c.

Tested, therefore, by the rules of this honorable Court, applicable to "proceedings in admiralty or revenue cases," it was material to the due service of the writ, that the Marshal should have *seized* and taken into his custody, and under his control *the promissory note mentioned.*

It may not be inappropriate to suggest, in this connection, that the conclusion of the libel, praying "process in due form of the law," &c., was, perhaps, borrowed from the appendix to Conkling's Treatise, 4th Ed. p. 834.

~~3d Ed.~~, page ~~882~~, and so, likewise, the "warrant of arrest," at page ~~834~~ commanding the Marshal "*to attach* the goods," seems to have been borrowed, instead of adhering to the exact language of the ninth rule, which

requires that "in all cases of seizure, and other suits and proceedings, *in rem*, the process, unless otherwise provided for by statutes, shall be by *a warrant of arrest* of the ship, goods, or other thing,"—and the learned author has also given the form of a return by the Marshal, where the warrant is executed, which Marshal Rose has followed literally. "In obedience to the within warrant *I have arrested*," &c.

There is, perhaps, nothing important in these forms, except to assist in the interpretation of the very material words employed in the case submitted; but the plaintiff's counsel believe, that in that light they are important. Having been in long use, the words referred to, have thereby obtained a definite legal meaning. Distinguished jurists and able lawyers have, by their adoption of these forms, acquiesced in their propriety, and by usage have sanctioned the idea that the mandate of the writ to attach the property described, is executed by arresting it. That the terms are convertible, each implying the same thing, and that they have been thus held hitherto, in this particular class of cases, would seem too plain for argument, and that to accomplish an attachment, or an arrest, in a case of the kind, there must be an actual manual seizure of the thing required to be attached, or arrested, seems to us to be inwoven in the very framework of admiralty jurisdiction.

5. It was urged by counsel, that a promissory note is a credit; that credits are subject to confiscation by the act of July 17, 1862; that no actual seizure can be made of a mere credit, for it is an incorporeal right which cannot be seen or handled; and therefore the act of July 17, 1862, must not be construed as requiring an actual seizure of credits.

It is not necessary to consider what proceedings or process, or notice are required under existing laws to procure a legal decree of condemnation, against a mere incorporeal right.

That question is not involved in this case.

If a promissory note is a credit, it is also property, a material, visible, tangible thing, which may be the subject of gift, bequest or purchase, and which may be seized, detained, confiscated and condemned.

There is no doubt that a promissory note is a *res* against which proceedings *in rem* may be instituted under the act of July 17, 1862. The Government elected to institute proceedings *in rem* against this note. It did not proceed against a mere credit. The information is framed *in rem;* the monition is *in rem;* the return shows that the service was *in rem;* the decree of sale was *in rem.* The *res*, all the way through, is "one promissory note for $7,000," which the Marshal was commanded to "attach and detain in his custody," and which he says in his return, "I have arrested in obedience to the within command."

We do not stop to inquire what proceedings might have been instituted against the "credit," or against the debtor, or what would have been the duty of the Marshal in the due and legal sevice of any process that might have been issued in such proceedings. That question is immaterial here.

What we claim, and all we claim is that, the Government having elected to institute proceedings *in rem* against the promissory note described in the libel, and having issued a monition to the Marshal commanding him to attach the same and detain it in his custody, it was material and necessary in that proceeding to the due and legal service of said writ of monition, that the Marshal should actually seize the note.

II. The second question—"whether the return to the writ of monition, as set forth in the declaration, must be construed to mean, that the said Marshal had actually taken into his custody, and under his exclusive control, the said promissory note," is involved in the first, and has been anticipated.

The Marshal was commanded to attach the note, and take the same into his custody. Under this mandate it was material and necessary that he should actually seize the note. He could not execute the writ, without seizing the note. The return uses the apt and technical language fixed by long and settled usage in admiralty proceedings, to denote an actual seizure of the *rem* described in the libel.

III. The remaining question is—"whether, on the hypothesis that all the matters set forth in said declaration are true, the judgment and proceedings of the District Court as therein stated, would estop said plaintiff to maintain an action on said promissory note against the maker."

"When a Court has jurisdiction to proceed *in rem*, and does so proceed, its judgments are conclusive and binding on the whole world." *Ashbrook* v. *The Steamer Golden Gate*, Newberry's Admiralty Reports, p. 306. See also Conkling's Treatise, 4 ed., p. 232; *Trump et al.* v. *The Ship Thomas*, Bee's Admiralty reports, 86; *Sheaf and Turner* v. *The Brig Betsy*, *Id.*, 169; 2 Phillips on Evidence, 5; 4 Miller's Lou. Rep. 81, 85, 86; *Thomas* v. *Southard*, 2 Dana, 475, 482; *The Mary*, 9 Cranch, 126.

The record of the proceedings in the district Court, by reason of the false return of the Marshal, shows that the Court had jurisdiction over the *rem*. The correctness of this return cannot be questioned in a collateral proceeding.

"It is a general rule that the acts of ministerial officers, so far as the rights of the parties affected thereby are concerned, must be taken as true, when brought into question collaterally, and can only be impeached by direct proceedings, such as those which make the officer a party." *Trigg* v. *Lewis' Exors.* 3 Litt. 129; *Sergeant* v. *George*, 5 Litt. 199; *Taylor* v. *Lewis*, 2 J. J. Mar. 400; *Remington* v. *Henry*, 6 Blackf. 63; *Burger* v. *Becket*, 6

Blackf. 61; *Hamilton* v. *Matlock*, 5 Blackf. 420; *Bruce* v. *Holden*, 21 Pick. 187; *Putnam* v. *Man*, 3 Wend. 202. See also cases collected in Cowen & Hill's Notes to Phillips on Evidence, 3 Ed., Part II. vol. 4, p. 799.

The plaintiff *would* unquestionably be *estopped*, by the record, from maintaining an action on the promissory note, against the maker.

Had the plaintiff sued the maker, the latter could, and no doubt would have pleaded the record in bar. The record shows jurisdiction, plainly and conclusively. The Marshal's return to the mandate gave jurisdiction. The return was false, but the plaintiff would not have been admitted to aver or prove that fact, against the record. No court would have permitted its truth to be questioned, had the maker been sued.

We perhaps owe this honorable court an apology, for what may be regarded as a waste of words, upon a principle of the law so well understood at the present day.

But it was said, if our theory should be sustained, the plaintiff must fail in this suit, because it must be presumed that, only that was sold by the Marshal, which had been seized by him, in the first instance; and if there was no seizure, there was no sale.

The argument is a fallacy.

It does not follow, that because the note had not been seized, it was not in fact sold. The truth of the return made to the *venditioni*, has not been questioned by either party. On the contrary, the plaintiff holds to, and insists upon the verity of that return; and he holds the Marshal to it. That officer has certified that he sold the note, and he is estopped from controverting his return. If, therefore, its truth cannot be assailed by direct and positive averment, it surely cannot be, by indulging in presumptions, or surmises.

The declaration avers, that it was *not* seized under the mesne process; and that down to the period of the adjudication of the case, it was never within the limits of the State of Indiana.

But *non constat* that, after the *venditioni* was issued, it did not in fact come to the hands of the Marshal. Such a circumstance might have occurred, and it must be presumed did occur. The plaintiff is not required, we suppose, to show how, or when, or where the officer got hold of the thing, at the last. The Marshal, or his deputy might be able to explain all that, if the inquiry should become material, which however we cannot anticipate.

We conclude by referring briefly, to one other point in the argument of the defendant's counsel.

It was claimed, that the service of the summons upon the maker of the note, was equivalent to a garnishment, in proceedings by attachment.

The point is untenable.

It has been already shown, that a garnishment can arise, only in suits, *in personam;* and then, there must be a clause in the warrant, for the arrest of the person of the defendant; and if he cannot be found, to attach his goods and chattels, to the amount sued for; or, if such property cannot be found, to attach his credits and effects to the amount sued for, *in the hands of the garnishee named therein.*"

Rule 2.

There is no analagous rule applicable to "cases of seizure, and other suits, and proceedings, *in rem;*" the rule being, *in all such cases*, imperative, that the process, unless otherwise provided for by statute, *shall be by warrant of arrest of the thing.*

Rule 9.

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